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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON EDWARD FRYER,

Defendant and Appellant.

C047190

(Sup.Ct.No. CM020991)

Defendant Brandon Edward Fryer entered a negotiated plea of no contest to first degree burglary. (Pen. Code, § 459.) The trial court sentenced him to state prison for the six-year upper term.

On appeal, defendant claims the trial court's decision to impose the upper term violates his constitutional rights to a jury trial and proof beyond a reasonable doubt. Defendant relies on the recent decision of the United States Supreme Court

in *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403] (hereafter *Blakely*), and related authority.

DISCUSSION

The trial court cited the following aggravating factors supporting imposition of the upper term: (1) execution of the crime indicated planning and sophistication; (2) the crime involved a taking or attempted taking of great monetary value; (3) defendant's prior convictions were numerous or of increasing seriousness; (4) defendant had served a prior prison term; (5) he was on parole when the crime was committed; and (6) his prior performance on probation or parole had not been satisfactory. (See Cal. Rules of Court, rule 4.421(a)(8), (9), (b)(2)-(5).) The court found no mitigating factors.

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried by a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional factfindings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. at p. ____ [159 L.Ed.2d at pp. 413-414].)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term because the court relied upon facts not submitted to a jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

The contention fails. One of the reasons the trial court gave for imposing the upper term is defendant's prior criminal convictions. (Cal. Rules of Court, rule 4.421(b)(2).) As we have noted, the rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase the penalty for a crime. Defendant argues that his "sentence was aggravated based upon more than just prior convictions as allowed by *Apprendi*." But since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of other factors, in addition to the prior convictions, in deciding whether to impose the upper term did not violate the rule of *Apprendi* and *Blakely*.

Moreover, defendant entered a *Harvey* waiver in this case that encompassed not only dismissed counts but his prior criminal history. (See *People v. Harvey* (1979) 25 Cal.3d 754.) Although defendant was not specifically advised of the right to a jury trial by proof beyond a reasonable doubt on these facts, the *Harvey* waiver he entered was explained in extremely broad terms. Specifically, defendant agreed to the following: "I stipulate the sentencing judge may consider my prior criminal history and the entire factual background of the case, including any unfilled,

dismissed or stricken charges or allegations or cases when granting probation, ordering restitution or imposing sentence."

DISPOSITION

The judgment is affirmed.

MORRISON, J.

I concur:

RAYE, Acting P.J.

I concur in the result:

HULL, J.